83-137

No. ..-...

IN THE

Supreme Court of the United States

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October Term, 1983

BERLITZ SCHOOLS OF LANGUAGES OF AMERICA, INC.,
Petitioner,

vs.

VICKI BARTELT,
Respondent.

BERLITZ SCHOOLS OF LANGUAGES OF AMERICA, INC.,
Petitioner,

vs.

LYDIA MELSEN,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

LAWRENCE J. GARTNER, ESQ.
Counsel of Record
LITTLER, MENDELSON, FASTIFF & TICHY
A Professional Corporation
1925 Century Park East, Suite 850
Los Angeles, CA 90067
(213) 553-0308

MELINDA SWEET, ESQ.
MACMILLAN, INC.
866 Third Avenue
New York, NY 10022
(212) 702-2000

Attorneys for Petitioner

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Questions Presented.

1. Can a female employee who alleges that she replaced a male employee at less pay for equal work claim a continuing violation of Title VII of the Civil Rights Act of 1964 every time she subsequently receives a paycheck?

2. Can an employee allege an equal pay for equal work violation under Title VII of the Civil Rights Act of 1964 if the claim would not constitute a violation of the Equal Pay Act of 1963?

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, Berlitz Schools of Languages of America, Inc. (hereinafter referred to as "Berlitz"),[1] respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit reversing the grant of summary judgment to Berlitz in two actions brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (hereinafter referred to as "Title VII"), and remanding to the District Court for further proceedings.

Opinions Below.

The opinion of the Court of Appeals reversing the grant of summary judgment and remanding is reported at 698 F.2d 1003 and appears at Appendix A, *infra*, pages 1 to 11. The order of the Court of Appeals denying Berlitz' petition for rehearing and rejecting Berlitz' suggestion for rehearing *en banc* appears at Appendix B, *infra*, page 12.

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[1]Pursuant to this Court's Rule 28.1, Berlitz states that it is wholly owned by Macmillan, Inc. Domestic subsidiaries and affiliates of Berlitz are the following: Abrasive Action, Inc.; Associated Mailers, Inc.; Bradbury Press, Inc.; Business Mailers, Inc.; Collier Macmillan International, Inc.; Convenient Ticket Company; Gump's, Inc. (California); Gump's, Inc. (Texas); Katharine Gibbs School (Incorporated) (New York); Katharine Gibbs School (Incorporated) (Connecticut); Katharine Gibbs School (Incorporated) (Maryland); Katharine Gibbs School (Incorporated) (Massachusetts); Katharine Gibbs School (Incorporated) (New Jersey); Katharine Gibbs School (Incorporated) (Rhode Island); Katharine Gibbs School — Huntington (Incorporated); G. Schirmer, Inc.; LaSalle Extension University; Lexington Andrews International, Inc.; Macmillan Book Clubs, Inc.; Macmillan Capital Corporation; Macmillan Charter, Inc.; Macmillan Financial Corporation; Macmillan Investment Corporation; Macmillan Performing Arts, Inc.; Macmillan Ticket Company; National Register Publishing Company, Inc.; P.F. Collier, Inc.; P.F. Collier Export Company; Standard Rate and Data Service, Inc.; The Berlitz Schools of Languages of East Asia, Inc.; The Berlitz Schools of Languages of New York, Inc.; U.S. School of Music, Inc; Crowell International, Inc.; Front & Brown Corp.; Glencoe Publishing Co., Inc.; Associated Music Publishers, Inc.; Katharine Gibbs Realty Trust; P.J. Kennedy & Sons; and Standard Rate & Data Service, Inc.

Jurisdiction.

The opinion of the Court of Appeals was entered on February 8, 1983. The Court of Appeals filed its order denying Berlitz' petition for rehearing and rejecting the suggestion for rehearing *en banc* on April 28, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Statutory Provisions Involved.

United States Code, Title 42, Section 2000e-5(e)

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

United States Code, Title 42, Section 2000e-2(h)

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or priv-

ileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

United States Code, Title 29, Section 206(d)(1)

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees of the opposite sex in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage

rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

Statement of the Case.

Berlitz is in the business of teaching foreign languages and providing translation services at schools located throughout the United States. Each school is headed by a Director who is primarily responsible for its overall operation.

In January 1975, Respondent Lydia Melsen (hereinafter referred to as "Melsen") was appointed Acting Director of the school located in Oakland, California, replacing Walter Haeussler, the previous Director. More than three years later, Melsen filed a charge of discrimination with the Equal Employment Opportunity Commission, dated November 14, 1978, in which she claimed that she had been denied equal pay for equal work. She subsequently filed an action under Title VII on May 1, 1979.

In July 1977, Respondent Vicki Bartelt (hereinafter referred to as "Bartelt") was transferred to the school located in Palo Alto, California to become Director, replacing Gunther Barth, the previous Director. Nearly two years later, she filed a charge with the Equal Employment Opportunity Commission, dated April 11, 1979, in which she claimed that she had been denied equal pay for equal work. She subsequently filed an action under Title VII on January 14, 1980.

In their respective complaints, Melsen and Bartelt alleged denial of equal pay for equal work, in comparison both to the individual male school directors whom they had replaced and to other male school directors employed at schools in different locations.

After completion of discovery, Berlitz moved for summary judgment in each lawsuit on October 30, 1980. The

grounds for Berlitz' motions were, *inter alia:* (1) that Melsen and Bartelt had failed to file timely charges of discrimination alleging equal pay violations in comparison with their respective predecessors; and (2) that Melsen and Bartelt could not advance equal pay claims in comparison to male school directors employed at schools in different locations.

On January 6, 1981, the United States District Court for the Northern District of California issued an Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment in Melsen's lawsuit. Judgment was entered in favor of Berlitz on May 8, 1981.[2] On January 6, 1981, the District Court also issued an Order Granting Defendant's Motion for Summary Judgment in Bartelt's lawsuit. Judgment was entered in favor of Berlitz on February 5, 1981. Melsen and Bartelt appealed the judgments to the United States Court of Appeals for the Ninth Circuit. On June 19, 1981, the cases were ordered consolidated for appeal.

On February 8, 1983, the Court of Appeals rendered its decision, with Judge Poole dissenting, reversing the grant of summary judgment to Berlitz and remanding the case to the District Court. On February 18, 1983, Berlitz petitioned for rehearing and suggested rehearing *en banc*, arguing that the opinion of the Court of Appeals was at odds with applicable decisions of this Court and with previous decisions of the Court of Appeals. Berlitz' petition and suggestion was denied by the Court of Appeals on April 28, 1983.

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[2]The District Court granted summary judgment on Melsen's equal pay claims but denied summary judgment on a retaliation claim. When the retaliation claim was subsequently dismissed with prejudice by stipulation of the parties, judgment was entered in favor of Berlitz.

REASONS FOR GRANTING THE WRIT.

This case presents two significant issues concerning litigation of equal pay claims under Title VII rather than the Equal Pay Act. The first concerns the point at which the time period for filing a Title VII charge of discrimination begins to run where an employee alleges denial of equal pay for equal work in comparison to her predecessor. Berlitz argued, and the District Court agreed, that in such circumstances the time limitation specified in Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e), begins to run at the point when the aggrieved party replaces his or her predecessor. Because Melsen and Bartelt filed their charges of discrimination substantially more than 300 days after replacement of their predecessors, their claims were time-barred. The Court of Appeals reversed, holding that a policy of paying lower wages to female employees constituted a continuing violation and that both Melsen and Bartelt therefore filed charges within 300 days of the payment of an allegedly discriminatory wage. App. A at 3.

The second issue concerns what standards govern an equal pay claim when brought under Title VII rather than the Equal Pay Act. Berlitz argued, and the District Court agreed, that Melsen and Bartelt could not advance equal pay claims in comparison to male directors employed in different establishments. The Court of Appeals reversed this ruling. Although it agreed that the single establishment restriction contained in the Equal Pay Act would have prevented Melsen and Bartelt from pursuing their equal pay claims under that statute, the Court of Appeals held that the single establishment requirement did not apply to such equal pay claims when brought under Title VII. *Id.* at 7-8.

A. The Decision of the Court of Appeals Nullifies the Timeliness Requirements Contained in Section 706(e) of Title VII.

In their Title VII lawsuits, Melsen and Bartelt first alleged denial of equal pay for equal work in comparison to their male predecessors. On this claim, the District Court granted summary judgment because Melsen and Bartelt had not filed charges of discrimination until considerably more than 300 days after replacing their male predecessors at allegedly lesser compensation.

Pursuant to Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e), Melsen and Bartelt were required to file charges of discrimination no more than 300 days after the occurrence of the alleged discrimination.[3] *Mohasco Corp. v. Silver*, 447 U.S. 807, 810 (1980). What is at issue herein is when this time period began to run. Berlitz argued, and the District Court agreed, that the 300 days began running when Melsen replaced Walter Haeussler, at allegedly lower compensation for allegedly equal work, and when Bartelt replaced Gunther Barth, at allegedly lower compensation for allegedly equal work.

The Court of Appeals reversed the District Court's ruling. Relying on *Jenkins v. Home Insurance Company*, 635 F.2d 310 (4th Cir. 1980), and *Satz v. ITT Financial Corp.*, 619 F.2d 738 (8th Cir. 1980), and referring to a previous decision in *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757 (9th Cir. 1980), the Court of Appeals held that a policy of paying lower wages to female employees on each payday constituted a continuing violation and that both Melsen and Bartelt had, therefore, filed charges within 300 days of the

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[3]Because the alleged discrimination occurred in California, a deferral state, Melsen and Bartelt were the beneficiaries of the extended time period contained in 42 U.S.C. § 2000e-5(e).

payment of an allegedly discriminatory wage. App. A at 3.

This Court specifically analyzed application of the time limitations contained in 42 U.S.C. § 2000e-5(e) in *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *accord, Chardon v. Fernandez*, 454 U.S. 6 (1981). The Court has also discussed the concept of continuing violations under Title VII in *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977). In reversing the District Court, the Court of Appeals failed to apply correctly the analysis set forth in these authorities; indeed, these decisions of the Court were not even referred to in the opinion of the Court of Appeals.

The result is a holding which, as described in the dissent, is "quite unsupported by logic or policy or anything in the language of Title VII." App. A at 9. By gerrymandering two discrete acts of alleged discrimination — the replacement of two male school directors at alleged lower pay for alleged equal work — into a "policy" of discrimination, the Court of Appeals essentially nullified the timeliness requirements contained in 42 U.S.C. § 2000e-5(e). The effect of its ruling is to eliminate any time limit at all for filing such equal pay charges under Title VII. This contradicts the purpose of the time requirements contained in 42 U.S.C. § 2000e-5(e), which is to "protect employers from the burden of defending claims arising from employment decisions that are long past." *Delaware State College v. Ricks, supra*, 449 U.S. at 256-57.

This Court first addressed the issue of timeliness and continuing violations under Title VII in *United Airlines, Inc. v. Evans, supra.* In that case, the Court rejected the contention of a female flight attendant that her loss of seniority based upon past actions of her employer constituted a "continuing violation" of Title VII. The Court held that the continuing effects of a past act of discrimination did not form the basis for a Title VII claim if that past act had not

been timely challenged. The Court thus stated that:

> Respondent is correct in pointing out that the seniority system gives present effect to a past act of discrimination. But United was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by § 706(d). A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. . . .
>
> Respondent emphasizes the fact that she has alleged a *continuing* violation. United's seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists. She has not alleged that the system discriminates against former female employees or that it treats former employees who were discharged for a discriminatory reason any differently than former employees who resigned or were discharged for a nondiscriminatory reason. In short, the system is neutral in its operation.

United Air Lines, Inc. v. Evans, supra, 431 U.S. at 558.

Following *United Air Lines,* the Court analyzed in *Delaware State College v. Ricks, supra,* the point at which the time periods specified in 42 U.S.C. § 2000e-5(e) begin to run. The Court held that the time within which a college professor had to file a charge alleging discriminatory denial of tenure began to run when he was formally notified of the denial of tenure, not from his last day of work. The Court stated that:

> Determining the timeliness of Ricks' EEOC complaint, and this ensuing lawsuit, requires us to identify precisely the "unlawful employment practice" of which he complains. Ricks now insists that discrimination

> motivated the College not only in denying him tenure, but also in terminating his employment on June 30, 1975. . . . In effect, he is claiming a "continuing violation" of the civil rights laws with the result that the limitations periods did not commence to run until his one-year "terminal" contract expired. This argument cannot be squared with the allegations of the complaint. *Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination.* [Citation omitted.] If Ricks intended to complain of a discriminatory discharge, he should have identified the alleged discriminatory acts that continued until, or occurred at the time of, the actual termination of his employment. But the complaint alleges no such facts.

Delaware State College v. Ricks, supra, 449 U.S. at 257 (emphasis added).

Observing that "termination of employment at Delaware State is a delayed, but inevitable, consequence of the denial of tenure," the Court further held that, in order to have the time period for filing a charge run from his last day of employment, Ricks would have had to allege and prove that his manner of termination differed from that of other professors who had been denied tenure. *Delaware State College v. Ricks, supra,* 449 U.S. at 257-58. The Court's decision in *Chardon v. Fernandez, supra,* reaffirmed this analysis.

The District Court properly applied the *United Airlines* and *Delaware State College* analysis to the instant cases. The unlawful employment practice of which Melsen and Bartelt complain is their replacement of male predecessors at allegedly lower compensation for allegedly equal work. Any effect on their subsequent compensation was simply "a delayed, but inevitable, consequence" of the compensation first set upon replacement of their male predecessors. *Delaware State College v. Ricks, supra,* 449 U.S. at 257-

58; *see Trabucco v. Delta Airlines*, 590 F.2d 315, 316 (6th Cir. 1979). Once their salaries were set, the mere fact that Melsen and Bartelt continued to receive the same paycheck again and again did not constitute a continuing violation. There was no allegation that *after* replacement of their male predecessors, Melsen's and Bartelt's salaries were modified in a manner different from that of other school directors.

Rejecting such an analysis, the Court of Appeals instead relied upon the purported existence of a "policy of paying lower wages to female employees on each payday." App. A at 3. The difficulty with this assertion is that there is no identification of what this purported policy is, whom it is alleged to have affected, or when it was purportedly in existence. Neither Melsen nor Bartelt ever alleged that anyone else at Berlitz had been discriminated against in a similar manner, and neither alleged any type of unlawful discrimination other than denial of equal pay, with the exception of Melsen's claim of retaliation which was subsequently dismissed with prejudice by stipulation.

As pointed out in the dissent to the opinion below, the Court of Appeals has used this assertion of a "policy" to skirt the requirement for filing charges within 300 days of the alleged discriminatory act. As the dissent states:

> The majority seeks shelter for this rationale by calling two discrete situations cumulatively a "policy." These are two separate cases which were not, when challenged on summary judgment, augmented by appropriate evidence sufficient to justify the terminology of "policy" or "practice" as we know those words.

Id. at 10.

Certainly something more needs to be alleged and proven than two discrete acts of discrimination to constitute a policy sufficient to overcome the purpose intended by 42 U.S.C. § 2000e-5(e). In *International Brotherhood of Teamsters v.*

United States, 431 U.S. 324, 336 (1977), for example, this Court defined a pattern and practice of discrimination as "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts" but rather "the company's standard operating procedure — the regular rather than the unusual practice." *See Jewett v. International Telephone and Telegraph Corp.*, 653 F.2d 89, 91-92 (3rd Cir. 1981).

Reliance by the Court of Appeals on *Jenkins v. Home Insurance Co.*, *supra*, and *Satz v. ITT Financial Corp.*, *supra*, is misplaced. In both cases, a present and continuing equal pay violation on a paycheck by paycheck basis was found to have been alleged because the equal pay comparison was made between male and female employees who *continued* in their employment. Thus, at each paycheck, an equal pay comparison could arguably be made between present employees and a present equal pay violation alleged. Such was not the case in the instant lawsuits with respect to Melsen's and Bartelt's predecessors; their employment as directors ceased when Melsen's and Bartelt's began.

The practical consequences of the Court of Appeals' ruling on this issue is to eliminate any time requirement at all for filing such charges of discrimination, thus nullifying Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e). Under its continuing violation theory, an employee could conceivably claim an equal pay violation based upon a compensation decision made as much as 15 or 20 years before merely because the employee continued to receive a paycheck. As the dissent notes, the majority opinion holds that:

> [I]f a member of a protected class is hired at a discriminatory wage, that person presumably may wait for years and years before bringing charges because each pay check tendered by the employer constitutes a "continuing violation" of the original act of discrimination.

App. A at 9.

For this reason, reliance by the Court of Appeals below on a continuing violation theory appears to be at odds with a number of other appellate decisions which apply the time limitations contained in 42 U.S.C. § 2000e-5(e) to various employment situations. *See, e.g., Heymann v. Tetra Plastics Corp.*, 640 F.2d 115, 120, 123 (8th Cir. 1981) (failure to timely challenge initial job assignment and layoff); *Goldman v. Sears, Roebuck & Co.*, 607 F.2d 1014, 1017-19 (1st Cir. 1979), *cert. denied*, 445 U.S. 929 (1980) (dismissal of claims of discriminatory transfer as untimely despite allegations of repeated requests for return to original position); *Martin v. Georgia-Pacific Corp.*, 568 F.2d 58, 61-62 (8th Cir. 1977) (untimely challenge to alleged denial of transfer based on seniority); *Trabucco v. Delta Airlines, supra* (dismissal of lawsuit charging discriminatory reclassification from teletype operator to transportation agent because of failure to file a timely EEOC charge); *Milton v. Weinberger*, 645 F.2d 1070, 1074-77 (D.C. Cir. 1981), and *Patterson v. General Motors Corp.*, 631 F.2d 476, 483-85 (7th Cir. 1980), *cert. denied*, 451 U.S. 914 (1981) (both rejecting arguments that denial of promotion constituted a continuing violation).

This Petition should, therefore, be granted in order to review the opinion of the Court of Appeals on the timeliness issue, because its ruling effectively nullifies the requirements of 42 U.S.C. § 2000e-5(e) based upon a continuing violation theory which is at odds with applicable decisions of this Court.

B. Failure to Apply Equal Pay Act Standards to Equal Pay Claims Brought Under Title VII Will Permit Inconsistent Results Depending Upon the Statute Sued Under.

In addition to equal pay claims in comparison to their predecessors, Melsen and Bartelt also alleged that they had been denied equal pay in comparison to male directors em-

ployed at Berlitz schools in different locations. In its opinion, the Court of Appeals agreed that such claims would not constitute a violation of the Equal Pay Act because the comparison was not asserted between employees of a "single establishment." App. A at 7-8. However, because Melsen and Bartelt brought their equal pay claims under Title VII, rather than the Equal Pay Act, the Court of Appeals held that the single establishment criterion did not apply, and it therefore reversed the District Court's grant of summary judgment. *Id.* at 8.

The issue of whether Equal Pay Act standards govern equal pay claims brought under Title VII has not been considered by this Court. Contrary to the implication in the opinion below, *id.*, this question was not decided in *County of Washington v. Gunther*, 452 U.S. 161 (1981). Rather, the sole issue considered in *Gunther* was whether sex-based compensation claims *other than equal pay claims* could be brought under Title VII. *County of Washington v. Gunther, supra*, 452 U.S. at 163, 166, n.8. By the time the *Gunther* litigation had reached this Court, the plaintiff's equal pay claims were no longer at issue. *Id.* at 165.

Resolution of this issue is necessary to avoid future misapplication of the Court's *Gunther* decision and to eliminate present uncertainties as to what standards apply to equal pay claims brought under Title VII. If allowed to stand, the decision below permits advancement of equal pay claims under Title VII which would be invalid under the Equal Pay Act, resulting in inconsistent results on the same claim depending upon the statute sued under.

It should be clear that the instant lawsuits involve only claims of denial of equal pay and not claims of other types of sex-based compensation discrimination. An unfortunate imprecision in the language used by the Court of Appeals to describe the issue raised and the precise nature of Mel-

sen's and Bartelt's claims might leave a contrary impression. For example, the Court of Appeals defined the issue as follows:

> The district court also granted summary judgment on the ground that, as a matter of law, the data concerning the salaries of male directors at other Berlitz schools would not establish a violation of Title VII because it did not show that the employer *discriminated in the payment of wages* to employees within a single establishment, a requirement of an Equal Pay Act violation. See 29 U.S.C. § 206(d) (1976).
>
> The premise underlying this ground for dismissal is that a *sex-based wage discrimination claim* may be brought under Title VII only if the evidence supporting the charge would establish a violation of the Equal Pay Act.

App. A at 4 (emphasis added).

Notwithstanding this language, only claims of denial of equal pay for equal work were advanced in these cases. The charges of discrimination filed by Melsen and Bartelt specifically alleged equal pay violations.[4] Equal pay claims were alleged in their complaints and in the pretrial papers filed with the District Court.[5] In fact, in their opening brief

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[4]The description by the Court of Appeals of Melsen's charge of discrimination as "charging Berlitz with discriminating against her in the payment of wages based on her sex," App. A at 2, is inaccurate because of its lack of precision. Melsen's charge specifically alleged that:

> I have been paid lesser salaries, commissions and bonuses as a female employee than male employees for doing substantially equal work, requiring substantially equal skill, effort and responsibility, performed under similar working conditions.
>
> I file this complaint on behalf of myself and past, present and future female employees who have been denied equal pay for equal work.

The language of Bartelt's charge is virtually identical.

[5]Both complaints alleged payment of lesser salaries, commissions and bonuses as a female employee than male employees for doing substantially equal work requiring substantially equal skill, effort and responsibility.

to the Court of Appeals, Melsen and Bartelt stated that "Appellants bring their action pursuant to Title VII *and allege that they were denied equal pay for equal work* while employed at Respondent Berlitz Schools of Languages" (Emphasis added.)

Since only equal pay claims are at issue in this case, the question remains whether such claims, when brought under Title VII, must satisfy Equal Pay Act requirements. The ruling of the Court of Appeals below that they do not contradicts language contained in an appellate decision from the same Circuit, thus creating considerable confusion. In its first opinion in *Gunther v. County of Washington*, 623 F.2d 1303 (9th Cir. 1979), the Court of Appeals for the Ninth Circuit stated that "we hold that Equal Pay Act Standards apply in Title VII suits when plaintiffs raise a claim of equal pay.[6] *Id.* at 1313. In its opinion denying rehearing, the Court of Appeals again held that:

> [W]hen a discrimination claim is based on a theory that the plaintiffs are denied equal pay for equal work, Equal Pay Act standards are applicable. When a claim of discrimination is not based on an equal work theory, it must be analyzed separately under Title VII.

Id. at 1318 (citation omitted).

The rationale for this previous Ninth Circuit ruling in its *Gunther* decision was the avoidance of inconsistencies between the Equal Pay Act and Title VII when only equal pay claims are at issue. As that opinion stated:

> The cases considering the relationship between Title VII and the Equal Pay Act have involved claims that females were being denied equal pay for equal work. *See, e.g., Di Salvo*, 568 F.2d 593; *Orr v. MacNeill*,

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[6]The opinion further held that "decisions interpreting the Equal Pay Act are authoritative where plaintiffs suing under Title VII raise a claim of equal pay." *Id.*

> 5 Cir., 511 F.2d 166. Quite properly, these cases have construed the two statutes harmoniously; any other approach may have produced different results depending on whether a plaintiff labeled his cause of action as being brought under "Title VII" or under the "Equal Pay Act."

Id. at 1311.[7]

This Court's discussion in its *Gunther* decision of the legislative history of the Bennett Amendment to Title VII supports such reasoning. As the Court noted, the Bennett Amendment was incorporated into Title VII as a result of Congressional concern over the potential inconsistencies between Title VII and the Equal Pay Act. *See, County of Washington v. Gunther, supra,* 452 U.S. at 171-76. To allow equal pay claims under Title VII which could not be brought under the Equal Pay Act totally ignores such congressional concerns.[8]

Because of the substantial uncertainty as to what standards apply to equal pay claims when brought under Title VII and how such claims are to be adjudicated, review of this issue by the Court would be highly desirable.

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[7]The opinion further noted that, "[w]hen plaintiffs raise a claim under Title VII of discriminatory compensation in the absence of an allegation that they perform substantially equal work, no conflict with the Equal Pay Act arises because the Equal Pay Act is inapplicable." *Id.* at 1313.

[8]Failure to resolve the question of what standards govern equal pay claims brought under Title VII will cause additional confusion in conjunction with the litigation of such claims. For example, different standards of proof apply under Title VII and the Equal Pay Act. *Compare, Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 252-253 (1981), *with Corning Glass Works v. Brennan,* 417 U.S. 188, 195-196 (1974). Indeed, the Ninth Circuit has recently ruled in *Kouba v. Allstate Insurance Co.,* 691 F.2d 873, 875 (9th Cir. 1982), that the Equal Pay Act burden of proof applies to equal pay claims brought under Title VII, a decision which is at odds with the thrust of the opinion below.

Conclusion.

In order to resolve serious questions regarding the litigation of equal pay claims under Title VII, Berlitz respectfully requests that the Court grant its Petition for a Writ of Certiorari in order to review the decision of the Court of Appeals below.

Respectfully submitted,

LAWRENCE J. GARTNER, ESQ.
Counsel of Record
LITTLER, MENDELSON, FASTIFF & TICHY,
A Professional Corporation
MELINDA SWEET, ESQ.
MACMILLAN, INC.
Attorneys for Petitioner

APPENDIX A

Opinion

United States Court of Appeals for the Ninth Circuit.

Vicki Bartelt, Plaintiff-Appellant, v. Berlitz School of Languages of America, Inc., Defendant-Appellee. No. 81-4064, DC. NO. C80-0104-RHS.

Lydia Melsen, Plaintiff-Appellant, v. Berlitz School of Languages of America, Inc. Defendant-Appellee. No. 81-4287, DC. No. C79-1033-RHS.

Filed: Feb. 8, 1983.

Argued and Submitted—April 14, 1982.

Appeal from the United States District Court for the Northern District of California, Robert H. Schnacke, District Judge, Presiding.

BEFORE: GOODWIN, FLETCHER, and POOLE, Circuit Judges.

FLETCHER, Circuit Judge:

Lydia Melsen and Vicki Bartelt brought separate actions against their former employer, Berlitz Schools of Languages of America, Inc. (Berlitz) under Title VII of the Equal Employment Opportunity Act, 42 U.S.C. § 2000e *et seq*. Both alleged that Berlitz discriminated against them as directors of Berlitz's schools by paying them lower salaries, commissions, and bonuses than either former male directors at their respective schools or male directors currently employed at other Berlitz schools. The district court granted Berlitz's motions for summary judgment. We reverse and remand both actions for further proceedings.

I

FACTS

Berlitz is a New Jersey-based corporation that operates language schools throughout the country. In 1968, Melsen began working for Berlitz in its Oakland school. In 1973,

she became assistant director, and in 1975, she replaced Walter Haeussler as acting director. She remained as director of the Oakland school until her termination in 1979.

Bartelt was hired by Berlitz as a management trainee in 1973 in the East Detroit school. In 1977, she transferred to the Palo Alto school and replaced Gunther Barth as director. She remained director until her termination in 1979.

In 1978, Melsen filed a charge of sex discrimination with the Equal Employment Opportunity Commission (EEOC), charging Berlitz with discriminating against her in the payment of wages based on her sex. Bartelt filed a similar charge with the EEOC in 1979.

In 1979, Melsen and Bartelt filed separate suits in district court. Both alleged that Berlitz violated Title VII by paying them less compensation than either their male predecessors or present male directors at other Berlitz schools for performing substantially equal work. At a hearing on Berlitz's motions for summary judgment, the district court ruled that: (1) neither Melsen nor Bartelt had filed a timely complaint with regard to charges that their compensation was less than their male predecessors because neither had filed a complaint with the EEOC within 300 days of their replacement of the former directors; and (2) neither could advance equal pay claims under Title VII based on a comparison with male directors employed in other Berlitz schools. The court granted summary judgment to Berlitz in both actions. Melsen's and Bartelt's appeals were consolidated by order of this court. We note jurisdiction under 28 U.S.C. § 1291 (1976).

II
DISCUSSION

A. STANDARD OF REVIEW

Summary judgment is proper only when, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

B. TIMELINESS

The district court granted summary judgment in part because it found the plaintiffs' claims based on a comparison of their wages with their predecessors' wages time-barred. Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e), requires that a discrimination charge be timely filed with the EEOC. Where, as here, there is a qualified state compliance agency, that time period is 300 days from the date of the alleged discriminatory act. *See Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 923 n.2 (9th Cir. 1982).

Berlitz argues that because Melsen and Bartelt began working as directors for Berlitz more than three hundred days before they filed a charge with the EEOC, their charges were untimely. We disagree. The policy of paying lower wages to female employees on each payday constitutes a "continuing violation." *Jenkins v. Home Insurance Co.*, 635 F.2d 310 (4th Cir. 1980); *Satz v. ITT Financial Corp.*, 619 F.2d 738, 743-44 (8th Cir. 1980). *See Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757, 759-61 (9th Cir. 1980). We conclude that the claims are timely because each plaintiff filed charges with the EEOC within three hundred days of a payment of allegedly discriminatory wages.[1]

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[1]Berlitz's primary argument is that the limitations period should run from the date the plaintiffs became directors because it was at this time that their allegedly discriminatory wages were set. In the alternative, however, Berlitz argues that the period for filing commenced at the time that the male predecessors left their positions. In advancing this argument, Berlitz makes two assumptions. First, it assumes that in order to state an "equal pay for equal work" claim under Title VII, the plaintiff must allege facts sufficient to establish an Equal Pay Act violation. Second, Berlitz assumes that an Equal Pay Act claim must be based on a comparison between the wage rates of current employees within the establishment. From these premises Berlitz argues that the last day that plaintiffs' predecessors were "employees" was the last day that a Title VII violation existed. According to Berlitz's theory, plaintiffs had three hundred days from that date to file a charge with the EEOC.

We reject Berlitz's alternative argument because it is an irrational distortion of both statutes. This reasoning would lead one to conclude that if the predecessor employee left more than three hundred days before the replacement arrived, the replacement could never file a timely

(footnote continued on following page)

C. *THE SINGLE ESTABLISHMENT REQUIREMENT*

The district court also granted summary judgment on the ground that, as a matter of law, the data concerning the salaries of male directors at other Berlitz schools would not establish a violation of Title VII because it did not show that the employer discriminated in the payment of wages to employees *within a single establishment*, a requirement of an Equal Pay Act violation. *See* 29 U.S.C. § 206(d)(1976).

The premise underlying this ground for dismissal is that a sex-based wage discrimination claim may be brought under Title VII only if the evidence supporting the charge would establish a violation of the Equal Pay Act. The Equal Pay Act addresses the problem of discrimination in the payment of wages based on the sex of the employee. It makes it unlawful for employers to pay different wage rates, based on the sex of the employee, to employees in the same establishment who perform equal work. *See Corning Glass Works v. Brennan*, 417 U.S. 188 (1974).[2] The coverage of

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charge with the EEOC. The time would have expired before any violation occurred.

We further note that under the Equal Pay Act plaintiffs need not rely solely on a discriminatory wage differential between *current* employees to establish a violation, but may make comparisons to prior employees. *See County of Washington v. Gunther*, 452 U.S. 161 (1981) (Rehnquist, J. dissenting) at 179 n.19; *id.* at 201-02. Thus even if it were necessary for the plaintiffs in this case to meet the criteria of the Equal Pay Act to state a claim under Title VII, a theory we reject, *see* discussion *infra*, that requirement has been met here.

[2]The Equal Pay Act was enacted as an amendment to the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19. It provides, in relevant part:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

29 U.S.C. § 206(d)(1)

Title VII with respect to discrimination on account of sex is much broader. Title VII makes it an unlawful employment practice for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's . . . sex . . ." 42 U.S.C. § 2000e-2(a). We note that the district court decided this case before the Supreme Court's decision in *County of Washington v. Gunther*, 452 U.S. 161 (1981) (Rehnquist, J. dissenting), which addressed the relationship of Title VII to the Equal Pay Act. *Gunther* rejected the assumption upon which the district court dismissed these actions.

In *Gunther*, the Supreme Court held that plaintiffs, four female prison guards, could bring claims of differential compensation under Title VII even though they could not satisfy the equal work standard of the Equal Pay Act. The Court rejected the argument that the Bennett Amendment to Title VII restricted Title VII's prohibition of sex-based wage discrimination claims to claims of "equal pay for equal work:"[3]

> In practical terms, [accepting this argument] means that a woman who is discriminatorily underpaid could obtain no relief—no matter how egregious the discrimi-

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[3]The Bennett Amendment provides:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29 [the Equal Pay Act].

42 U.S.C. § 2000e-2(h).

> nation might be—unless her employer also employed a man in an equal job in the same establishment, at a higher rate of pay. Thus, if an employer hired a woman for a unique position in the company and then admitted that her salary would have been higher had she been male, the woman would be unable to obtain legal redress under petitioners' interpretation. . . . Congress surely did not intend the Bennett Amendment to insulate such blatantly discriminatory practices from judicial redress under Title VII.

Gunther, 452 U.S. at 178-79.

Instead, the *Gunther* Court interpreted the Bennett Amendment as requiring only the incorporation of the four affirmative defenses of the Equal Pay Act into Title VII.[4] Thus, when faced with a sex-based wage discrimination claim brought under Title VII, the employer may successfully defend its action by showing that: (1) the compensation was paid pursuant to a seniority system; or (2) the payments were made pursuant to a merit system; or (3) the compensation was paid pursuant to "a system which measures earnings by quantity or quality of production;" or (4) the payments were based on any other factor other than sex. 29 U.S.C. § 206(d); *see Gunther*, 452 U.S. at 168-69.

Berlitz argues that the Supreme Court in *Gunther* did not specifically address claims based on an "equal pay for equal work" theory. When this theory is the basis for the claim under Title VII, Berlitz argues that the employer's action must constitute an Equal Pay Act violation. Otherwise, the result will be to subvert the scheme of the Equal Pay Act,

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[4]The court based its conclusion that the Bennett Amendment did not preclude the plaintiffs' Title VII claims on: (1) the language of the Bennett Amendment; (2) the legislative history of the adoption of the Amendment; and (3) the remedial purposes of the Equal Pay Act and Title VII.
Gunther, 452 U.S. at 168-80.

which Congress carefully designed to handle "equal pay for equal work" problems. The point of *Gunther*, however, is that Title VII's statutory scheme covers claims of sex-based wage discrimination, whether or not those claims also fall under the Equal Pay Act. Berlitz's view is contrary to the rationale of *Gunther* and the Supreme Court's pronouncement that courts must "avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate." *Gunther*, 452 U.S. at 178.

Moreover, contrary to Berlitz's assertions, the failure to read the "single establishment" restriction of the Equal Pay Act into Title VII will not result in numerous legal and practical problems nor will it thwart the sound policies of the Equal Pay Act. An Equal Pay Act challenge differs in important respects from an action brought under Title VII. Title VII contains a comprehensive scheme of administrative remedies that must be exhausted before suit is filed. 42 U.S.C. § 2000e-5. No administrative exhaustion is required under the Equal Pay Act.

Furthermore, the different statutes provide different remedies. Although Title VII authorizes a backpay remedy, under the Equal Pay Act, double back pay awards are authorized. *Compare* 42 U.S.C. § 2000e-5(g) *with* 29 U.S.C. § 216(b)(Supp. II 1978). The back pay recovery period in many cases will be longer under the Equal Pay Act than under Title VII. *Compare* 29 U.S.C. § 255 (1976)(employer who commits willful violation is liable for back pay for up to three years before suit is filed) *with* 42 U.S.C § 2000e-5(g) (recovery period limited to two years before date charges filed with the EEOC).

For these reasons, we reject Berlitz's approach. We agree that a comparison of plaintiffs' salaries with the salaries paid to male directors at other Berlitz schools is not between

employees of a "single establishment," and hence that Melsen and Bartelt would not be able to establish a violation of the Equal Pay Act by relying on this data. But plaintiffs have not brought an action under the Equal Pay Act. Title VII does not contain a "single establishment" limitation. *See Gunther*, 452 U.S. at 171. We hold that the evidence of the salaries of male directors at other Berlitz schools, which supports plaintiffs' sex-based wage discrimination claims, may be introduced to support a claim under Title VII even though it would not support an Equal Pay Act claim. It was error for the district court to grant summary judgment to Berlitz.

IV
CONCLUSION

Plaintiffs' claims based on a comparison of their salaries with their predecessors' are not time-barred. Evidence that Berlitz paid lower wages to plaintiffs than to male directors at other Berlitz Schools may be used to establish a sex-based wage discrimination claim under Title VII.

We REVERSE the grant of summary judgment to Berlitz and REMAND the case to the district court for further proceedings consistent with this opinion.

MELSEN V. BERLITZ SCHOOLS, No. 81-4287.

BARTELT V. BERLITZ SCHOOLS, No. 81-4067.

Filed: Feb. 8, 1983.

POOLE, Circuit Judge, dissenting.

I respectfully dissent for the reason that the claims of sex discrimination were untimely and thus the district court was correct in its grant of summary judgment.

The appellants claimed sex discrimination in that they were hired to fill jobs vacated by males and that from the outset they were paid less for the same work. But neither filed charges with the Equal Employment Opportunity Comission [*sic*] within the maximum 300 days as required by Section 706 of Title VII, 42 U.S.C. 2000-5(e). Nothing in this record implicates "equitable tolling" or other reason for this delay.

Melsen was first employed by Berlitz in 1968. She replaced a male Director at the Oakland school in January, 1975, at a rate of compensation lower than that paid her predecessor. But she did not file charges with EEOC until November 14, 1978, nearly four years later. Bartelt replaced a male as Director at the Palo Alto school in July, 1977. She did not file a charge until April 11, 197.., 21 months later.

My difference with the majority is obvious. They have neatly skirted the requirement of filing charges within 300 days by an expedient: they hold that if a member of a protected class is hired at a discriminatory wage, that person presumably may wait for years and years before bringing charges because each pay check tendered by the employer constitutes a "continuing violation" of the original act of discrimination.

This holding seems to me quite unsupported by logic or policy or anything in the language of Title VII. It does not

square with other cases. The majority has successfully rewritten the statute without waiting for a tardy Congress. This is troublesome. The view adopted today may seem better than the statutory policy but I do not understand such code updating to be our function. Nor does that view seem to comport with what the Supreme Court has stated in *United Air Lines v. Evans*, 431 U.S. 553 (1977), where Justice Stevens wrote:

> A discriminatory act which is not made the basis for a timely charge.
>
> Respondent emphasizes the fact that she has alleged a *continuing* violation. United's seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity. The critical questions is whether any *present* violation exists. (Emphasis original.)

431 U.S. 558

The majority seeks shelter for this rationale by calling two discrete situations cumulatively a "policy." These are two separate cases which were not, when challenged on summary judgment, augmented by appropriate evidence sufficient to justify the terminlogy [*sic*] of "policy" or "practice" as we know those words. But we need not wrangle over arcane contentions of evidence because it is clear that the majority's position is that each subsequent salary payment as to each single receipient [*sic*] generates another violation (whether styled "new" or "further" or mere continuum). In whatever form it is wrapped, the holding bends the statute to accomplish a result, on the argument that the Supreme Court has not explicitly *said* that there is no such thing as continuing violation.

One cannot well read the majority or dissent in *Mohasco Corp. v. Silver*, 447 U.S. 807, (1980), without concluding that basic to Title VII is a purpose of requiring claims to

be raised while they are temporally and seasonably fresh. Discrimination claims are committed to administrative processing in the first instance so that they may be resolved administratively if possible, on the theory that securing the substance of civil rights is the objective rather than protracted and stale litigation. It may well be that enlargement of the time for filing charges, as the majority now sanctions, will prove a salutary event, should it survive. The problem is that we do not write on a clean slate and ours is hot the role of convenient emendation even in support of the most noble of causes.

APPENDIX B

Order

United States Court of Appeals for the Ninth Circuit.

Vicki Bartelt, Plaintiff-Appellant, vs. Berlitz Schools of Languages of America, Inc., Defendant-Appellee. No. 81-4064, D.C. No. C79-1033-RHS.

Lydia Melsen, Plaintiff-Appellants, vs. Berlitz Schools of Languages of America, Inc., Defendant-Appellee. No. 81-4287, D.C. No. C80-0104-RHS.

Filed: April 28, 1983.

Before: GOODWIN, FLETCHER, and POOLE, Circuit Judges.

The majority of the panel in the above case has voted to deny the petition for rehearing, and Judges Goodwin and Fletcher have voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. FRAP 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.